

# State of Colorado



Bill Owens  
*Governor*

Richard Djokic  
*Director*

## DPA

Department of Personnel  
& Administration

### State Personnel Board

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## Meeting Minutes April 20, 2004

The State Personnel Board met in public session on Tuesday, April 20, 2004, at the Colorado Department of Transportation, 4201 East Arkansas Avenue, Second Floor Auditorium, Denver, Colorado 80222.

The meeting was called to order by Chair Joyce Lottner at approximately 9:00 a.m. In addition to Ms. Lottner, Board members Diedra Garcia and John Zakhem were present. Board member Elizabeth Salkind was present via telephone. Board member Linda Siderius was absent.

Richard Djokic, Board Director; First Assistant Attorney General Richard Forman, Board Counsel; and Jane Sprague, General Professional III, were present in person.

As a preliminary matter, Ms. Lottner invited persons present at the meeting to sign in, so that the Board would have a record of who attended the meeting, since there were several new persons in attendance at the meeting.

## **I. REQUESTS FOR RESIDENCY WAIVERS**

### **A. April 1, 2004 Report on Residency Waivers**

Mr. Djokic reported that there were no residency waiver requests to report on.

## **II. PENDING MATTERS - LEGISLATION**

### **A. House Bill 04-1373 - A Bill for an Act Concerning Modifications to the "State Personnel System Act"**

### **B. House Concurrent Resolution 04-1005 - Concerning Reform of the State Civil Service System**

- C. Senate Bill 04-131 - A Bill for an Act Concerning Modifications to the Procedures for Handling an Employment Discrimination Complaint Filed by an Employee in the State Personnel System

Mr. Djokic gave an update regarding the above pending legislation. HCR04-1005 and HB04-1373 went to the Senate on 3/18/04 and to the State Veterans and Military Affairs Committee on 4/5/04. On 4/13/04, the bills passed out of committee without substantive amendments and were laid over as of 4/19/04. The Democratic caucus is engaged in negotiations regarding amendments to the resolution and the bill, but the legislation is currently in flux. Since the session ends in two weeks, it's down to "fish or cut bait." In response to Mr. Zakhem's question as to what provisions are being considered for compromise, Mr. Djokic stated that the shift of authority from the Board to the Department of Personnel and Administration (DPA), the request for a change from 30 to 90 days on discretionary matters, contracting out, and the number of exempt positions are being considered for compromise; however, he is not sure what the result will be.

With regard to SB04-131, the bill passed out of the House on 3/16/04 with permissive language, "board may set the complaint for hearing," taking the Colorado Civil Rights Division (CCRD) out of the mix to do an investigation. An amendment was made to the language to return it to "board shall set the complaint for hearing," but with a fiscal note of 1 FTE in the Senate on 3/18/04. The bill was in conference committee on 3/30/04, but no report was made. Mr. Djokic stated that he had participated in a mid-March meeting with CCRD, Jeff Wells, and the Equal Employment Opportunity Commission (EEOC) to discuss requirements for CCRD and EEOC's files and to get all agencies in the same information loop. Mr. Djokic attended a second meeting with CCRD and EEOC to discuss freshening up the Memorandum of Understanding (MOU) between the Board and those entities and how they will interact with respect to cases and tracking.

### **III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD**

There were no initial decisions or other final orders of the Administrative Law Judge or the Director for review on appeal to the Board this month.

### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING**

- A. Robert Flores, David Holt, Ronald Johnsen, Donald Lawson, Dolores Montoya & Charlene Peterson v. Department of Corrections, State Personnel Board case number 2003G124.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

Director Djokic recused himself from participation in the discussion of the next two cases. Ms. Sprague called the case numbers and the votes in lieu of the Director.

- B. Harlen Ainscough v. Department of Public Health and Environment, Hazardous Materials & Waste Management Division, State Personnel Board case number 2003G114.

Ms. Garcia moved to adopt the Preliminary Recommendation of the Board's Director and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Zakhem, and Ms. Lottner. Ms. Salkind abstained from voting. Ms. Siderius was absent.

- C. Albert McNeill v. Department of Labor and Employment, State Personnel Board case number 2004G017.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Board's Director and deny the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

## **V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR**

- A. Lorraine Anglada-Palma and Cindy Slade v. Department of Revenue, Motor Vehicle Business Group, Driver License Section, State Personnel Board case number 2004B074(C).

On March 16, 2004, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary pay reduction of Complainants' salary was not arbitrary, capricious or contrary to rule or law, and ordered that Respondent's action is affirmed.

- B. Kem Reliford v. Department of Transportation, State Personnel Board case number 2003G128.

On March 26, 2004, the Initial Decision and Order Re: Respondent's Motion to Dismiss was issued. The ALJ found that Respondent's

termination of Complainant's probationary employment was not arbitrary, capricious or contrary to rule or law; concluded that Complainant failed to meet the burden of establishing *prima facie* case of discrimination; and dismissed Complainant's appeal with prejudice.

- C. Roger Kendall v. Department of Public Safety, Colorado State Patrol, State Personnel Board case number 2004B089.

On April 7, 2004, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's disciplinary suspension without pay of Complainant was not arbitrary, capricious or contrary to rule or law and ordered that Respondent's action is affirmed.

- D. Clemson D. Grove v. Department of Labor and Employment, Office of Field Operations, Workforce Development Programs, State Personnel Board case number 2004B032.

On April 8, 2004, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's termination of Complainant was not arbitrary, capricious or contrary to rule or law and ordered that Respondent's action is affirmed.

- E. James Aragon v. Department of Corrections, State Personnel Board case number 2001G096.

On April 8, 2004, the Initial Decision of the Administrative Law Judge was issued. The ALJ found that Respondent's denial of Complainant's grievance was not arbitrary, capricious or contrary to rule or law and ordered that Respondent's action affirmed and Complainant's appeal is dismissed with prejudice.

## **VI. REVIEW OF THE MINUTES FROM THE MARCH 1 AND MARCH 16, 2004 PUBLIC MEETINGS OF THE STATE PERSONNEL BOARD**

Ms. Garcia and Ms. Lottner expressed appreciation for the thoroughness of the Minutes to both Mr. Djokic and Ms. Sprague.

Ms. Lottner proposed the following revisions to the Minutes from the March 1, 2004 meeting: On page 1, add the word "special" before "public session" in the first line, and on page 3, delete the word "the" from the fourth paragraph after, "Mr. Djokic remarked that." Mr. Zakhem then moved to amend the Minutes of the March 1, 2004 meeting and approve them as amended. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

Ms. Lottner proposed the following revision to the Minutes from the March 16, 2004 meeting: On page 8, change "Ms. Salkind" to "Ms. Lottner" in the third paragraph, line 2, where the Minutes read, "Ms. Salkind noted that." Mr. Zakhem then moved to amend the Minutes of the March 16, 2004 meeting and approve them as amended. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Ms. Salkind, Mr. Zakhem, and Ms. Lottner. Ms. Siderius was absent.

## **VII. ACKNOWLEDGMENTS**

### **DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MARCH 16, 2004 PUBLIC MEETING:**

- A. Art Robinson v. Regents of the University of Colorado, University of Colorado at Denver, State Personnel Board case number 2003G130.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Michael McNevin v. Regents of the University of Colorado, University of Colorado Health Science Center, Procurement Service Center, State Personnel Board case number 2003G134.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- C. Stacy Bishop v. Department of Corrections, Youthful Offender System, State Personnel Board case number 2004B018.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

## **VIII. REPORT OF THE STATE PERSONNEL DIRECTOR**

Pat Romero, DPA, Division of Human Resources, presented a report on behalf of Jeff Schutt, Director of the Division. Pat initially addressed the distribution of performance pay for Levels 2, 3, and 4. When Ms. Garcia asked how this would work, Ms. Romero stated that performance evaluations completed this spring will be the determinant, and all employees who receive at least a "satisfactory" rating (2, 3, or 4), will receive a 2% salary increase across the board. All salary increases are base-building, unless an employee is at the range maximum for his position, in which case the increase will be non-base-building. The performance pay awards adopted by the legislature are consistent with the recommendations of Jeff Wells.

The second item on which Pat reported is the so-called "moonlighting bill," which will allow employees to perform a second job in the state. See Colorado Revised

Statutes, section 24-2-103, Compensation of heads of departments and other officers and employees, which prohibits a state employee from working more than 1 FTE or for another agency. Representative Buffie McFadyen is to introduce the bill today.

Pat also reported that regarding health benefits, DPA wants to lead reform, but SB04-10 was not successful. Pat offered to report on total compensation at next month's meeting.

## **IX. ADMINISTRATIVE MATTERS & COMMENTS**

### **A. ADMINISTRATIVE MATTERS**

- Budget Report and Revenue and Expense Report
- Cases Scheduled for Preliminary Review
- Cases on Appeal to the Board and to Appellate Courts
- Stateline Article by Joyce Lottner
- Notice of Public Hearing to Consider Adoption of Permanent Administrative Procedures
- Order Affirmed in Brown v. Department of Corrections, State Personnel Board case number 2002B043, Court of Appeals No. 03CA0244
- Director's Administrative Procedures; Effective May 2, 2004

Mr. Djokic reported that he was working with Jennifer Okes on Board budgetary matters. One priority was replacing the recording system in the courtroom; an FRT system, such as the one the Division of Administrative Hearings (DOAH) has, would be a big improvement but would cost \$6,000 to \$8,000 to upgrade the hearing room. The other budgetary consideration is the FTE depending on SB04-131 and the requirements for hearings on discriminatory matters. The Board still has .4 FTE which could be converted to a Legal Assistant or General Professional III position. With regard to the Preliminary Recommendations, there is still one outstanding from FY02, a few from FY03, and 11 currently from FY04.

With reference to her article in Stateline, Ms. Lottner thanked Julie Postlethwait for her assistance in writing the article. Mr. Djokic remarked that performance evaluations for staff are due on 4/29/04, and that he was eliciting comments on staff from Board members. With regard to the Director's evaluation, Ms. Garcia moved to delegate responsibility for his evaluation to the Chair. Ms. Lottner seconded the motion. The motion passed unanimously. Ms. Lottner also noted that copies of two letters had been distributed to the Board members: one addressed to Ms. Garcia to congratulate her for being named Businesswoman of the Year by the Denver Hispanic Chamber of Commerce and one addressed to Ken Salazar, Colorado Attorney General, for being named Government Advocate of the Year by the Denver Hispanic Chamber of Commerce.

B. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

Stacy L. Worthington, First Assistant Attorney General for the Employment Section, addressed the Board concerning changes in that section. She introduced two new assistant attorneys general: Valerie Arnold, formerly of the Business and Licensing Section, and Melanie Sedlak, formerly a public defender. She also informed the Board that Joe Haughain had moved into her unit, joining Monica Ramunda and Christian Ricciardiello. Colleen O'Laughlin, Andrew Katarikawe, and Luis Corchado have left the unit. Jill Gallet from the CCRD Team and Vince Morscher, who recently got his law degree, also receive assignments for the unit.

Harlen Ainscough, whose case was before the Board earlier in the meeting, introduced himself as the State Vice President of the Colorado Federation of Public Employees (CFPE) and the Chair of the Republican caucus of the American Federation of Labor/Congress of Industrial Organizations (AFL/CIO). Mr. Forman advised the Board that Mr. Ainscough could address the Board as long as he was speaking on a topic independent of a case and that a case does not preclude someone from addressing the Board. Mr. Ainscough stated that he has a good understanding of the grievance process and had testified for the rules prototype hearings in 1998 regarding the idea of preserving representation for grieving parties. He stated that in a grievance, the burden of proof is on the employee and the playing field is very unlevel. He asked the Board to look at ways to level the playing field and when evidence is presented on a grievance, to fully consider that evidence, and to look more fully at the merits of a grievance before denying petitions for hearing rather than applying the arbitrary and capricious standard. He also stated that he engaged in protected activity as a whistleblower and is preparing to file a whistleblower complaint for which he may be terminated. Mr. Zakhem asked him to send specific recommendations for changes to the Board rules for the next rulemaking session. Mr. Ainscough ended his remarks by saying that the frustration level is high among grievants and the only real option for grievants is the Board. Ms. Lottner thanked him for his comments and appearance.

Board Counsel Forman addressed the Board regarding cases on appeal. In the Rura case, a whistleblower case, the Court of Appeals issued its order affirming the Board's order in February. There was a petition for rehearing filed, but the Court has stayed appellate proceedings to allow for settlement negotiations to go forward. In the Venard case, a reply brief has been filed by Venard's attorney, William Finger.

Mr. Forman also spoke to the Board about the Open Meetings Law and a decision which he referred to as the Costilla County case. Several members of the Board of Commissioners of Costilla County attended a meeting, and the

argument was later made that this was, therefore, an open or public meeting, although the Board members were at the meeting in an adjunct role. The Court of Appeals held that where two or more members are present, notice of a public meeting must be posted since there is an official "meeting." As the "penalty" for the Commissioners' violating the Open Meetings Law, the Court awarded attorney's fees. Yesterday's opinion of the Supreme Court reversed the Court of Appeals, holding that it is necessary to show a connection between policy-making or decision-making functions of the Board members and their attendance at a meeting in order to trigger the Open Meetings Law. The concern is that Board members may use social gatherings to discuss Board matters.

Finally, Mr. Forman announced that he is retiring from the Attorney General's Office effective at the end of the fiscal year, June 30, 2004, and stated that it was an honor and a privilege to work with the Board for the last two years.

The Board did not go into Executive Session and the meeting ended by consensus.

## **X. EXECUTIVE SESSION**

### **A. Case Status Report**

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**APPROVED THIS 18th DAY OF MAY, 2004.**

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Joyce Lottner, Chair

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John Zakhem, Vice Chair

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Diedra Garcia, Member

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Elizabeth Salkind, Member